90-1945

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FILED
JUN 19 1991
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
JUNE TERM, 1991

MICHAEL B. KING,

Plaintiff-Petitioner,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF GEORGIA, et. al.

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Michael B. King, respectfully urges that this Honorable Court grant this Petition for Writ of Certiorari, seeking review of the judgment of the Court of Appeals for the Eleventh Circuit, filed February 4, 1991, affirming the judgment

of the District Court for the Northern District of Georgia granting the motion for summary judgment.

OPINIONS BELOW

A decision of the Eleventh Circuit, filed on February 4, 1991, affirming the district court's granting of summary judgment to the defendants appears as Appendix A. The decision of the Eleventh Circuit rejecting the plaintiff's petition for a rehearing en banc, filed May 13, 1991, appears as Appendix B.

The memorandum decision of the United States District Court for Northern District of Georgia, filed January 19, 1990, appears as Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was filed on February 4, 1991. (Appendix A.) On May 13, 1991, a decision was filed by the Eleventh Circuit rejecting the plaintiff's petition for a rehearing en banc. (Appendix B.) The period pending the petition for rehearing tolled the period in which the petition for certiorari must be filed.

Department of Banking v. Pink, 317 U.S. 264, 266 (1942). Thus, this petition is being filed timely. 28 U.S.C. > 2101(c).

Jurisdiction is invoked pursuant to section 1254(1) of Title 28 of the United States Code. Because the within petition is timely filed from the decision of the Eleventh Circuit, February 4, 1991, and the decision rejecting the suggestion for rehearing en banc, May 13, 1991, this court has jurisdiction to determine the questions raised in the prior appeal to the Eleventh Circuit arising out of the same litigation. Mercer vs. Theriot, 377 U.S. 152, 153-154 (1964).

SUPREME COURT RULES

Federal Rule of Civil Procedure 56(c) provides:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Federal Rule of Civil Procedure 10(a) provides:

"Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the name of the first party on each side with appropriate indication of other parties."

STATEMENT OF THE CASE

A. Summary of Proceedings Below

On March 9, 1988, the plaintiff-petitioner filed a complaint in the United States District Court for the Northern District of Georgia alleging that the defendants-respondents had violated his procedural and substantive due process rights when he was disqualified from Georgia State University College of Law. The individually-named defendants were sued in their individual capacity. The Board of Regents of the University of Georgia was sued for prospective equitable relief.

On August 18, 1989, the defendants filed a motion for summary judgment. The defendants argued that the plaintiff did

not present any evidence to support his due process claims. The defendants also argued that the plaintiff did not sue the individually-named defendants in their individual capacity. The defendants relied solely on the plaintiff's deposition to support their summary judgment motion. The plaintiff was disposed before the defendants responded to the plaintiff's discovery requests.

The plaintiff contended that summary judgment for any of the defendants was improper because the evidence was sufficient to raise genuine issues of material facts. The plaintiff produced pleadings, answers to interrogatories, admissions, and his affidavit (with documents attached) to show that genuine issues of material facts were present in this case. The plaintiff also contended that the individually-named defendants were sued in their official and individual capacities.

The district court concluded that no genuine issue of fact existed in this case. (Appendix C.) The court also concluded that

the individually-named defendants were sued only in their official capacity. (Appendix C.)

On the appeal, the Eleventh Circuit Court of Appeals affirmed the decision of the district court granting summary judgment to the defendants. (Appendix A.)

B. Facts Pertinent to a Determination of this Petition

In August, 1984, the defendants-respondents made the plaintiff-petitioner an offer by accepting him for admission to Georgia State University College of Law. The plaintiff had a similar offer from Memphis State University College of Law. The plaintiff accepted the defendants' offer by registering for his law school courses. The defendants agreed to provide the plaintiff with instruction and to evaluate the plaintiff's law school examinations. The defendants also agreed to use an anonymous grading system and to follow their own policies and procedures. The plaintiff agreed to pay the tuitions and fees and to abide by the rules and regulations of the law school.

In September, 1984, the plaintiff enrolled in Georgia State University College of Law. The plaintiff paid his tuition and fees, and abided by the defendants' rules and regulations. The plaintiff possessed "the intellectual capacity, maturity, moral character and motivation necessary for the successful completion of the law school's requirements leading to the Doctor of Law (J.D.) degree."

At the end of the plaintiff's third year, his assigned grade average was 71.3. The assigned grade average was based on numerical grades which the defendants placed on his law school transcript. The plaintiff's law school instructors did not evaluate his law school examinations. There were no grades or evaluation comments on the plaintiff's law school examinations. The instructors did not have any criteria for evaluating the examinations. The plaintiff's grades were determined by the law school before he completed his examinations.

On defendant Kathleen Marcel's grade sheets, the law school printed the names of students who were enrolled in civil

procedure, their examination numbers and their assigned grades. (Plaintiff's Affidavit, Exhibits O and P). The plaintiff's name, examination number and assigned grade were printed on the grade sheets. There were grades printed on the sheets for students who did not take the civil procedure examinations. The grade sheets were in the possession of the civil procedure instructor (defendant Marcel) before the plaintiff completed the civil procedure examinations. The plaintiff's other law school instructors also possessed similar grade sheets for their classes. The grade sheets were in their possession before the plaintiff completed his examinations.

The plaintiff tried to personally present his grade claims to the law school's Committee on Student Affairs. The defendants, however, denied the plaintiff the opportunity to personally appear before the Committee. According to the defendants' own rules and regulations, the plaintiff had a right to personally appear before the Committee. Ironically, the defendants stated in their response to the plaintiff's interrogatory

that their decision to disqualify the plaintiff from the law school was based on information which he presented during his personal appearance before the Committee.

When the defendants disqualified the plaintiff from the law school, he was prevented from earning a law degree from an American Bar Association approved school. The plaintiff has also been prevented from taking the bar examinations in Florida and Alabama.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

ARGUMENT

I.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS AS TO WHETHER A NONMOVANT HAS PRODUCED SUFFICIENT EVIDENCE TO RAISE A GENUINE ISSUE OF MATERIAL FACT

The Court of Appeals for the Eleventh Circuit held that the plaintiff did not present any evidence to raise a genuine issue of material fact as to his substantive and procedural due process claims. (Appendix A.) Although the decision of the Eleventh Circuit was not published, this is a recurring issue in that it is based on the Eleventh Circuit's interpretation of what evidence is sufficient to raise a genuine issue of material fact. (See Rollins v. Techsouth, Inc., 833 F. 2d 1525, 1528 (11th Cir. 1987), holding that the nonmovant produced sufficient evidence to raise a genuine

issue of material fact.)

This Court has recently addressed this issue. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held that a motion for summary judgment should not be granted if the pleadings, depositions, answers to interrogatories, admissions and affidavit show that there is a genuine issue of material fact. See F.R.C.P. 56(c).

In determining whether a factual issue exists, the lower court must consider all of the evidence in the light most favorable to the nonmoving party. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). The lower court must believe the evidence of the nonmovant, and all justifiable inferences are to be drawn in the nonmovant's favor. Anderson, at 255.

In the present case, the plaintiff produce sufficient evidence to raise genuine issues of material facts as his due process claims. The plaintiff produced pleadings, answers to interrogatories, admissions and an affidavit (with documents

attached) to support his due process claims. The plaintiff's ungraded law school examinations were part of the case record. The examinations clearly showed that the defendants arbitrarily and capriciously assigned grades to the plaintiff's law school transcript.

The grade sheets of the plaintiff's civil procedure instructor, defendant Kathleen Marcel, were also part of the case record. The names of students (including the plaintiff's name), student's examination numbers and students' grades were printed on the grade sheets. There were grades on the sheets for students who did not take the civil procedure examinations. The grade sheets were in the possession of defendant Marcel before the plaintiff completed the civil procedure examinations. Similar information was in the possession of the plaintiff's other law school instructors.

The plaintiff clearly met his burden of producing sufficient evidence to establish each essential element of his due process claims. See Celotex Corp., at 322. The plaintiff was required to

show that the defendants acted arbitrarily and capriciously in assigning grades to his law school transcript and disqualifying him from law school. See Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) and Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985). The plaintiff met his burden by producing his ungraded examinations and grade sheets, which showed his grades before he completed the examinations.

The plaintiff urges the Court to review this case because the decision of the Eleventh Circuit conflicts with the decisions of the Court and denies the plaintiff his right to a jury trial.

II.

THE DECISION BELOW CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT AND A DECISION OF THIS COURT AS TO WHETHER THE PLAINTIFF'S MONETARY CLAIMS AGAINST THE INDIVIDUALLY-NAMED DEFENDANTS ARE BARRED BECAUSE THE PLAINTIFF DID NOT USE THE WORDS "IN HIS (OR HER) INDIVIDUAL CAPACITY" IN THE CAPTION OF THE COMPLAINT.

The Eleventh Circuit affirmed the district court's holding, that based on the "caption of the case and the proceedings up to

this juncture, the court initially determined that plaintiff contemplated a suit against the defendants only in their official capacity." (Appendix A.)

The Court addressed this issue in Kentucky v. Graham, 473 U.S. 159 (19895). The Court noted that "In many cases, the complaint will not clearly specify whether officials are being sued personally, in their official capacities or both. The course of the proceedings in such cases typically will indicate the nature of liability sought to be imposed." Id. In the present case, the plaintiff did not use the "magic" words "in his official and individual capacities" in the caption of the complaint. The individually-named defendants, however, were informed during the course of the litigation that they were being sued in their personal capacity.

The Fifth Circuit addressed this issue in Williams v. Thomas, 692 F. 2d 1032, 1040 (1982). The court noted the significance of a plaintiff filing an action pro se. The Fifth Circuit held that a pro se plaintiff should not be denied monetary relief

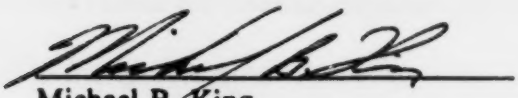
against individually-named defendants because he did not use the "magic" words "in his individual capacity." Id. at 1040. In the present case, the plaintiff filed his action pro se. The plaintiff was only required to state the name of the court, the title of the action and the file number in the caption of the complaint. See Federal Rule of Civil Procedure 10(a). This information was provided in the caption of the complaint. Since the plaintiff fully complied with Rule 10(a), he should not be denied monetary relief against the individually-named defendants because he did not use the words "in his (or her) individual capacity" in the caption of the complaint.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit. (Although this petition has dealt only with due process and sovereign immunity issues, the plaintiff does not waive the other contentions in the appeals brief).

This 17th day of June, 1991.

Respectfully submitted,



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APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8224
Non-Argument Calendar

D. C. Docket No. 1:88-cv-570-RHH

MICHAEL B. KING,

Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNIVERSITY OF GEORGIA; GEORGIA STATE UNIVERSITY: WILLIAM M. SHUTTLES, Acting President of Academic Affairs; MARJORIE KNOWLES, Dean of the College of Law; COMMITTEE ON STUDENT AFFAIRS (1987); KATHLEEN MARCEL; JODIE ENGLISH; BERNADETTE HARTFIED; CHARLES MARVIN; CORNEILL STEPHENS and ROY SOBELSON, and all other persons succeeding or acting in the offices or official capacities of the above named, and their agents, subordinates and employees,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(February 4, 1991)

Before TJOFLAT, Chief Judge, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

This is an appeal from the grant of summary judgment to defendants in a civil rights action brought by a black law student complaining about his academic dismissal from law school. We affirm the district court's judgment. The district court found and concluded that some defendants were improper parties, that sovereign immunity barred the damage claims, and that no genuine issue of fact existed on the due process, equal protection, free speech, and contract claims. Plaintiff also challenges some district court discovery rulings, but we see no abuse of discretion.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-8224

MICHAEL B. KING,

versus

BOARD OF REGENTS OF THE UNIVERSITY OF GEORGIA; GEORGIA STATE UNIVERSITY; WILLIAM M. SHUTTLES, Acting President; THOMAS BREWER, Vice President for Academic Affairs; MARJORIE KNOWLES, Dean of the College of Law; COMMITTEE ON STUDENT AFFAIRS (1987); KATHLEEN MARCEL; JODIE ENGLISH; BERNADETTE HARTFIELD; CHARLES MARVIN; CORNEILL STEPHENS and ROY SOBELSON, and all other persons succeeding or acting in the offices or official capacities of the above named, and their agents, subordinates and employees,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S)

OF REHEARING EN BANC

(Opinion February 4, 1991, 11th Cir., 19__ F.2d___).

Before: TJOFLAT, Chief Judge, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL B. KING,

Plaintiff,

1:88-cv-570-RHH

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF GEORGIA, GEORGIA STATE UNIVERSITY, WILLIAM M. SUTTLES, Acting President, THOMAS BREWER, Vice President for Academic Affairs, MARJORIE KNOWLES, Dean of the College of Law, COMMITTEE ON STUDENT AFFAIRS (1987), KATHLEEN MARCEL, JODIE ENGLISH, BERNADETTE HARTFIELD, CHARLES MARVIN, CORNEILL STEPHENS, ROY SOBELSON, and all other persons succeeding to or acting in the offices or official capacities of the above named, and their agents, subordinates and employees,

Defendants.

ORDER

Plaintiff claims that defendants dismissed him from Georgia State University College of Law ("College of Law") in

violation of his civil rights. Specifically, plaintiff claims that defendants conspired to limit the number of Blacks entering the legal profession and, in furtherance of this conspiracy, dismissed plaintiff from the College of Law. Plaintiff seeks declaratory and injunctive relief as well as actual and punitive damages. Currently before the court is defendants' motion for summary judgment. For the reasons stated below, the court GRANTS defendants' motion.

FACTS

Plaintiff enrolled in Georgia State University College of Law in September, 1984. At that time, plaintiff also had a full-time position as a physical education instructor with the Atlanta Board of Education.

In the Spring of 1986, plaintiff was dismissed from the College of Law for failing to maintain the requisite grade point average. Plaintiff then petitioned the Committee on Student Affairs for readmission. In his petition for readmission plaintiff was required to state the reasons for his unsatisfactory academic

performance and to outline a plan for attaining better grades in the future. Plaintiff stated that he did not know the reason for his poor performance; he remarked that he had received positive feedback from his instructors for his classroom participation. Plaintiff did not allege at this time that his poor performance was a result of discriminatory actions by defendants.

Plaintiff was readmitted to the College of Law on academic probation. After three quarters on probation, plaintiff still had not improved his performance; in fact, his average had dropped further. Plaintiff was therefore dismissed from the law school. On his second petition for readmission, plaintiff again stated that he did not know the reason for his poor performance. He did, however, state that his performance would improve if he were readmitted. Nonetheless, the Committee on Student Affairs decided that plaintiff had not demonstrated the capacity to continue his studies. According, the Committee refused to reinstate plaintiff.

Plaintiff appealed the Committee's decision to the Dean of the College of Law, Marjorie Knowles. Dean Knowles affirmed the Committee's decision. Dean Knowles also informed plaintiff of his right to appeal her decision to the Vice President for Academic Affairs, Thomas Brewer.

In his letter to Mr. Brewer, plaintiff raised for the first time the issue of racism. Plaintiff told Mr. Brewer that he believed that the College of law was operating a conspiracy to limit the number of Blacks entering the legal profession. Plaintiff felt that the College of Law assigned low grades to Black students and then dismissed them in furtherance of this conspiracy. Plaintiff also stated in his letter to Brewer that his dismissal was possible in retaliation for speaking out on behalf of other Black law students who had been dismissed.

Vice President Brewer denied plaintiff's appeal. Brewer then informed plaintiff of his right to appeal the decision to Acting President William Suttles. President Suttles also denied plaintiff's appeal. Suttles then informed plaintiff of his right to appeal to the

Board of Regents. Next, plaintiff appealed to the Board of Regents. The Board of Regents denied his appeal. Finally, plaintiff filed this action.

The central allegation of plaintiff's suit is that defendants were engaged in a conspiracy to limit the number of Blacks entering the legal profession. Plaintiff claims that he was a casualty of this alleged conspiracy. Specifically, he maintains that professors assigned him unjustifiably low grades so that he was ultimately dismissed from the College of Law. Plaintiff asserts that the conspiracy resulted in the violation of his rights to due process, equal protection, freedom of speech and freedom to contract.

Defendants now move the court for summary judgment on a variety of theories.

DISCUSSION

I. Standard of Review

This court will grant summary judgment when "there is no genuine issue as to any material ... and the moving party is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must demonstrate that the nonmoving party lacks evidence to support an essential element of her or his claims. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The movant's burden is "discharged by showing - that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Once the movant has met this burden, the opposing party must present evidence establishing a material issue of fact. Id. The nonmoving party must go "beyond the pleadings" and present evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324.

While all evidence and factual inferences should be viewed in a light most favorable to the nonmoving party, Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of

material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in the original). An issue is not genuine if unsupported by evidence or created by evidence that is "merely colorable" or "not significantly probative." Id. at 250. Similarly, an act is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248. Thus, to survive a motion for summary judgment, the nonmoving party must come forward with specific evidence of every element essential to his or her case so as to create a genuine issue for trail. Celotex Corp., 477 U.S. at 323; Rollins, 833 F. 2d at 1528.

II. Application

A. Improper Parties

Defendants Georgia State University, Georgia State University College of Law, and the Committee on Student Affairs move for summary judgment on the grounds that they are not entities capable of being sued. Fed. R. Civ. P. 17(b) governs the capacity to sue or be sued. Rule 17(b) provides in pertinent part:

> The capacity of an individual, other than one acting in a representative capacity, to sue to be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held...

Under Georgia law, Georgia State University, Georgia State University College of Law, and the Committee on Student Affairs are not parties capable of being sued. When the Board of Regents of the University System of Georgia was given control over state colleges and universities, such institutions were divested of their individual rights to sue or be sued. See 1970 Op. Att'y Gen. No. 70-173; McCafferty v. Medical College of Georgia, 249 Ga. 62, 64-65 (1982). Because Georgia State University, Georgia State University College of Law, and the Committee on Student Affairs are not entities capable of being sued, the court GRANTS these defendants summary judgment and DISMISSES them from the above-styled action. See United States v. Olavarrieta, 812 F.2d 640, 643 (11th Cir. 1987).

B. Sovereign Immunity

1) Board of Regents

Plaintiff's monetary claims against the Board of Regents under 42 U.S.C. § § 1981 and 1983 are barred by the Eleventh Amendment. U.S. Const., Amend. XI. The Amendment prohibits actions against a state or its agencies without consent. Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association, 450 U.S. 147 (1981); Alabama v. Pugh, 438 U.S. 781 (1979); Edelman v. Jordan, 415 U.S. 651, 666-71 (1974); Brown v. East Central Health District, 752 F.2d 615 (11th Cir. 1985). Additionally, where monetary relief sought by plaintiff would be paid out of the state treasury, the suit is one against the state and is barred by the Eleventh Amendment. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 (1984). Plaintiff's claim for money damages against the Board of Regents is essentially a claim against the state. There is no evidence that the State of Georgia has waived its immunity in the present case. Nor did Congress intend a

waiver of such immunity. Quern v. Jordan, 440 U.S. 332 (1979) (reaffirming Edelman, 415 U.S. 651 (1974)); see also Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989). Accordingly, the Board of Regents is entitled to summary judgment on plaintiff's claim for monetary relief under § § 1981 and 1983.

Of course, the Eleventh Amendment does not bar the granting of declaratory or injunctive relief. See Scheuer v. Rhodes, 416 U.S. 232 (1974); ex parte Young, 209 U.S. 123 (1908).

2) Individual Defendants

Defendants William M. Suttles, Thomas Brewer, Marjorie Knowles, Kathleen Marcel, Jodie English, Bernadette Hartfield, Charles Marvin, Corneill Stephens and Roy Sobelson ("individual defendants") all claims that they are entitled to summary judgment on the grounds of sovereign immunity. In Kentucky v. Graham, 473 U.S. 159, 166-67 (1985), the Supreme Court discussed the immunities available to individual defendants, depending on whether they are sued in personal-capacity of official-capacity:

> When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law ... In an official-capacity action, these defenses are unavailable ... The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment.

Id. Defendants claim that the individual defendants in this case have only be sued in their official capacity. However, in response to defendants' motion for summary judgment, plaintiff maintains that the defendants are sued in both their personal and official capacities. In his response, plaintiff also requested that, should the court be unable to determine the capacity in which the defendants were being sued, plaintiff be granted leave to amend the complaint to state a claim against the individual defendants in their personal capacities.

From the caption of the case and the proceedings up to this juncture, the court initially determined that plaintiff contemplated a suit against the individual defendants only in their official capacity. See Brandon v. Holt, 469 U.S. 464, 469 (1985) (The

course of proceedings typically will indicate the nature of the liability sought to be imposed). However, by order dated November 17, 1989, the court afforded plaintiff an opportunity to amend his complaint to state a cause of action against the individual defendants in their personal capacity. On November 27, 1989, plaintiff filed his "Response to the November 17, 1989 Court Order." In this response, plaintiff strangely refused to amend the complaint, claiming that "the record provides adequate notice to the court as the capacities in which the defendants are being sued." Response, p. 2. Because plaintiff has chosen to ignore the court's order providing him an opportunity to amend the complaint, he must now suffer the consequence of failing to state a cause of action against the individual defendants in their personal capacities. In line with Brandon v. Holt, 469 U.S. at 469, the court finds that plaintiff's action is only against defendants in their official capacity.

Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is

an agent." Monell v. Department of Social Services, 436 U.S. 658, 690 n. 55 (1978). Suits against individuals in their officials capacities as employees of a state are suits against the state, barred by the doctrine of sovereign immunity. Id.; see also Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976);[1] Graham, 473 U.S. at 166; Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509, 1512-13 (11th Cir. 1986). The court GRANTS the individual defendants summary judgment on plaintiff's monetary claims against them in their official capacity. Accordingly, all claims against the individual defendants for monetary damages are now DISMISSED.

C. Substantive Claims

The claims remaining are thus for injunctive or declaratory relief against the Board of Regents and the individual defendants

[1] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent all former Fifth Circuit cases submitted or decided prior to October 1, 1981.

in their official capacity. Plaintiff brings these claims pursuant to 42 U.S.C. § § 1981 and 1983.[2]

1) Due Process

In paragraph 54 of his Complaint, plaintiff alleges that

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[2] Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1983 provides: "Every person who, under color of any statue, ordinance, regulation, custom, or usage, or any state or territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia."

Section 1983 is generally regarded as providing protection for a broader base of civil rights than section 1981. Section 1981 protects against discrimination on the basis of race and alienage in a limited range of civil rights including the right to make an enforce contract. Although it is not confined to actual contractual matter, it is most often invoked in that context.

defendants deprived him of due process. In paragraph 53 plaintiff states:

> Defendants have deprived plaintiff of the right to practice law contingent upon his right to graduate from Georgia State, by actions having no reasonable relation to any proper educational and governmental purpose. Defendants acted arbitrary, capricious, discriminatorily and in bad faith [sic].

Defendants move for summary judgment against plaintiff on his due process clause claims.

Section 1 of the Fourteenth Amendment provides in pertinent part:

> [N] or shall any State deprive any person of life, liberty, or property, without due process of law.

Substantive due process rights are violated when government actions "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples..." Rochin v. California, 342 U.S. 165, 169 (1952). Substantive due process rights are violated when the government's action is arbitrary and capricious, no matter what procedural

safeguards are in place. See Kelley v. Johnson, 425 U.S. 238, 248 (1976).

Plaintiff asserts that defendants' decision to dismiss him from Georgia State University College of Law was arbitrary and capricious. He asserts that the only reason he was dismissed was to further the defendants' conspiracy to keep Blacks out of the legal profession. However, all the evidence in this action reveals that plaintiff was dismissed for failing to retain the minimum grade point average required for further study. There is no legitimate evidence proffered by plaintiff which demonstrates the law professors were improperly assigning low grades to Black students. Throughout his deposition, plaintiff fails to provide any specifics as to the alleged conspiracy. See King Deposition, p.p. 89 - 90 and 92 - 93. He readily admits he has no direct evidence of a conspiracy; rather, he states that it is a "theory." Id. at 90. Plaintiff also fails to rebut the testimony of all his professors that they adhered to Georgia State University's anonymous grading system. Id. at 36-37, 38, 42-43, 50-52, 75.

Under the Celotex standard for summary judgment, plaintiff has simply failed to demonstrate that a material issue of fact remains for trial on his substantive due process claim. Accordingly, the court GRANTS defendants summary judgment on this claim.

Plaintiff also asserts that defendants breached his procedural due process rights when they dismissed him. The fundamental requirement of procedural due process is that an individual receive notice and the opportunity to be heard at a meaningful time. Mathews v. Eldrige, 424 U.S. 319, 348 (1976); Goldberg v. Kelly, 397 U.S. 254, 268 - 269 (1970). After reading all the pleadings in this action, the court is convinced that defendants carefully followed the general appeals procedure outlined at page 28 of the College of Law Bulletin for school years 1987 - 88. Plaintiff was informed of his dismissal from law school, given the reason for his dismissal and informed how to petition for readmission. He had the opportunity to explain his past academic performance and to present a plan for attaining a

higher grade point average. After his petition was denied by the Committee on Student Affairs, plaintiff was informed of his right to appeal the decision to the Dean. He was subsequently informed of his right to appeals at different levels, culminating with this right to appeal to the Board of Regents. The court finds that plaintiff was afforded procedural due process at every necessary juncture. No factual issue relating to plaintiff's procedural due process claim remains for trial. Accordingly, the court GRANTS defendants summary judgment on plaintiff's procedural due process claim.

2) Equal Protection

Plaintiff claims in paragraph 54 of the Complaint that defendants' violated his right to equal protection of the laws when they dismissed him from the College of Law. To support an equal protection clause claim, plaintiff must prove unequal treatment of similarly situated persons and racially discriminatory intent or purpose. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Plaintiff

asserts that Black students were treated differently from similarly situated white law students. Specifically, plaintiff states that defendants had a predetermined plan to assign Black students poor grades so that they would be dismissed from the law school. Plaintiff maintains that white students were not treated in this manner. As noted above, however, plaintiff's theory is merely that, a "theory". Plaintiff has not produced one scintilla of evidence which lends credibility to his theory. "[M]erely conclusory allegations of unconstitutional motive, devoid of factual support, must be found lacking and dismissed." Harlow v. Fitzgerald, 457 U.S. 800 (1982). Accordingly, the court GRANTS defendants summary judgment on plaintiff's equal protection clause claim.

3) First Amendment

Plaintiff alleges that defendants violated his right to freedom of expression. Complaint ¶ 55. The basis of this allegation is that plaintiff allegedly undertook to advocate on behalf of certain dismissed Black students before university

officials. Plaintiff contends that defendants decided to dismiss him in retaliation for his alleged advocacy.

As defendants demonstrate in their Motion for Summary Judgment, however, plaintiff fails to establish that he engaged in any First Amendment activity. Plaintiff admits that he never voiced his concerns to the Dean of the College of Law, university officials or the Board of Regents until after he was dismissed from the law school. King Deposition, p.p. 16, 19 - 20, 24 and 30 - 35. Plaintiff therefore fails to demonstrate that he ever voiced a complaint to the defendants for which they retaliated by dismissing him.

In his Complaint, plaintiff alleges that he and another student named Ron Ramsey were selected by fellow students to communicate their concerns to professor Linda Chastang. Complaint ¶ 14-18. There is no evidence, however, that Ms. Chastang agreed to communicate any of the students' concerns to the administration. See King Deposition, p. 131-2; Ramsey Deposition, p. 30 - 32. Thus, there is no evidence that plaintiff

was penalized by approaching a school official with his concerns. Without establishing that he engaged in protected First Amendment activity, plaintiff cannot make out a claim against defendants for violating his freedom of speech. Accordingly, the court GRANTS defendants summary judgment on plaintiff's First Amendment claim.

4) Right to Contract

Plaintiff alleges in paragraphs 56 - 58 that defendants "arbitrarily and discriminatorily deprived the plaintiff the right to contract [sic]. A right protected by the Thirteenth Amendment and 42 United States Code, Section 1981 [sic]." The right to make contracts protected by section 1981 extends only to the formation of a contract. Thus, section 1981 protects against discriminatory refusals to enter into contract, as well as offers to make contracts only discriminatory terms. The right does not, however, extend to conduct after the contract relationship is established. See Patterson v. McLean Credit Union, -- U.S. --, 109 S. Ct. 2363 (1989). All the allegations in plaintiff's

Complaints relate to post-formation interactions. Section 1981 is of no benefits to plaintiff. Finding that plaintiff has failed to present an actionable claim under section 1981, the court GRANTS defendants summary judgment on plaintiff's freedom to contract allegation.

CONCLUSION

The court GRANTS defendants' motion for summary judgment in its entirety. Thus, there are no outstanding claims remaining and the above-styled action is terminated.

So ORDERED this _____ day of January, 1990.

_____
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Petition for Writ of Certiorari, by hand delivery upon:

Carol A. Callaway
Attorney for Respondents
132 State Judicial Building
Atlanta, Georgia 30334

This 17th day of June, 1991.

Michael B. King, pro se
Attorney at Law